No. 677

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CHARLES ELMORE

In the Supreme Court of the United States

No. 14168

CIVIL

M. M. MEREDITH,

Petitioner and Appellant below,

vs.

JOHN DEERE PLOW COMPANY,
of Moline, Illinois, a Corporation,

Respondent and Appellee below.

Resistance to Allowance of Certiorari, Brief of Respondent

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INDEX

Pages

Statement of Case 1

Summary of Points to be Argued and Authorities Relied on 2-7

Argument 7-17

Point I 7-13

Substantive Law of Iowa Applicable to and Controlling in this Case was as Determined by Circuit Court of Appeals.

Point II 7-13

The Law of Iowa Conforms to the Law which is Generally Applicable.

Point III 13-14

Only in Exceptional Case will the Supreme Court Review Applying of Local Law by Lower Federal Courts.

Point IV 14-15

As to Questions Controlled by State Law, Conflict among Federal Circuit Courts is Not of Itself a Reason for Granting a Writ of Certiorari.

Point V 15-16

Certification Not Granted where no New or Difficult Questions of Law are Presented.

Point VI 15-16

Circuit Court of Appeals Has Not in this Case Decided an Important Question of Federal Law—It was One of Applicable Substantive Law of Iowa.

INDEX—Continued

Pages

Point VII 16-17

Decision of Circuit Court of Appeals Not in Conflict with Kelly-Springfield Tire Case on the Same Matter.

Point VIII 17

Writs of Certiorari are only Granted under Special Circumstances and in Cases of General Importance.

CASES CITED

Bendix Home App. Co. v. Radio Accessories Co., 129 Fed. 2d 177 ..... 4, 8

Brooks v. Sinclair Ref. Co., 139 Fed. 2d 746 (10th Cir.) 4

Busby v. Electric Utilities Employees Union, 323 U. S. 72, 89 L. ed. 78, 65 S. Ct. 142 ..... 5, 14

Bushwick-Decatur Motors, Inc., v. Ford Motor Co., 116 Fed. 2d 675 4

Cella v. Brown, 144 Fed. 742, 75 C. C. A. 608, certiorari denied 26 S. Ct. 766, 202 U. S. 620, 50 L. ed. 1174 6

Claiborne-Reno Co. v. E. I. DuPont DeNemours & Co., 77 Fed. 2d 565, 89 A. L. R. 238 (8th Cir.) 3

Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co., 114 Fed. 77 (8th Cir.) 3

D. Del Vechio v. Bowers, 296 U. S. 280, 285, 80 L. ed. 229, 232, 56 S. Ct. 190 ..... 5, 14

District of Columbia v. Pace, 320 U. S. 698, 702, 88 L. ed. 408, 410, 64 S. Ct. 406 ..... 5, 14

CASES CITED—Continued

Pages

DuPont, E. I. DeNemours & Co. v. Claiborne-Reno Co., 64 Fed. 2d 224, 89 A. L. R. 238 (8th Cir.) writ of Certiorari denied 290 U. S. 646, 78 L. ed. 561, 54 S. Ct. 64 ..... 3, 7, 8, 11

Erie R. R. Co. v. Tompkins, 304 U. S. 64, 82 L. ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487 ..... 2, 8, 14

Fabre v. Cunard S. S. Co., 59 Fed. 500, 8 C. C. A. 199 6

Faulkner v. Des Moines Drug Co., 117 Ia. 120, 90 N. W. 585 ..... 2, 8

Ford Motor Co. v. Kirkmeyer Co., 65 Fed. 2d 1011 4

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U. S. 251, 257, 258, 60 L. ed. 629, 633, 634, 36 S. Ct. 269 ..... 7, 17

Huffman v. Paige-Detroit Motor Co., 262 Fed. 116 4

Kelly-Springfield Tire Co. v. Bobo, 4 Fed. 2d 71 (9th C. C. A.) 6, 16

Lewis v. Minnesota Mutual Life Ins. Co., 240 Ia. 1249, 37 N. W. 2d 316 ..... 2, 3, 7, 8

Miami Coca-Cola Bottling Co. v. Orange Crush Co., 296 Fed. 693 ..... 4, 8

Motor Car Supply Co. v. Gen. H. Util. Co., 80 Fed. 2d 167 4

Myers Motors, Inc., v. Kaiser-Frazer Sales Corp., 178 Fed. 2d 291, 303 (8 Cir.) 4

Oakland Motor Co. v. Indiana Auto Co., 201 Fed. 499 3

Palmer v. Hoffman, 318 U. S. 109, 87 L. ed. 645, 63 S. Ct. 477 ..... 5, 14

Ruhlin v. N. Y. Life Ins. Co., 304 U. S. 202, 82 L. ed. 1290, 58 S. Ct. 860 ..... 5, 14

CASES CITED—Continued

Pages

Santaella Co. v. Otto F. Lange Co., 155 Fed. 719 ..... 3, 8

Silbernagle v. Hirsh D. Co., 99 Fed. 2d 829 4

Standard Oil Co. v. Veland, 207 Ia. 1340, 224 N. W. 467 10

State of Ohio ex rel Seney v. Swift & Co., 260 U. S. 146, 67 L. ed. 176, 179, 43 S. Ct. 22 ..... 7, 17

Tamm v. Ford Motor Co., 80 Fed. 2d 723, 729-30 4

Terre Haute Brewing Co. v. Dugan, 102 Fed. 2d 425 ..... 4, 7, 9, 12

Velie Motor Car Co. v. Kormeier Co., 194 Fed. 324 3

Willard, Sutherland & Co. v. U. S., 262 U. S. 489-493, 43 S. Ct. 592, 67 L. ed. 1086 4

Wickham-Burton Coal Co. v. Farmers Lumber Co., 189 Ia. 1183, 179 N. W. 417, 14 A. L. R. 1293 ..... 3, 4, 10

Woerheide v. Barber Asphalt Co., 251 Fed. 196 4

Zelen v. Domestic Ind. Co., 135 Neb. 456, 282 N. W. 387 4

In the
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No. 14168
CIVIL

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M. M. MEREDITH,
Petitioner and Appellant below,

vs.

JOHN DEERE PLOW COMPANY,
of Moline, Illinois, a Corporation,
Respondent and Appellee below.

—o—

Resistance to Allowance of Certiorari,
Brief of Respondent

—o—

STATEMENT

The Petitioner's petition prayed general damages for the claimed termination of an alleged oral agency contract made in 1919 in the State of Iowa between the Petitioner's father and the Respondent. The petition claims that he succeeded to his father's rights to said contract after his father's death in 1932. The action was brought in the District Court of the State of Iowa and removed by the Respondent to the Federal District Court.

The Respondent moved to dismiss the action on the ground that the Petitioner's complaint failed to state a claim upon which relief could be granted (R. 12). The

District Court granted the motion and entered a judgment of dismissal (R. 32). The Petitioner appealed from the judgment.

The complaint is stated in two divisions (R. 1-9). A summary and substance of the complaint is set forth in the opinion of the District Court (R. 18-23, 89 Fed. Sup. 787), and also in the opinion of the United States Court of Appeals (R. 38-39, 185 Fed. 2d 481). No monetary or other independent consideration was pleaded. The complaint showed on its face that the Petitioner had and claimed the right to terminate the contract at will.

SUMMARY OF POINTS TO BE ARGUED AND AUTHORITIES RELIED ON BY RESPONDENT

I.

Since the substantive law applicable to this case is that of Iowa, the District Court and Circuit Court of Appeals were required to follow the law of that State (*Erie R. R. Co. v. Tompkins,* 304 U. S. 64, 82 L. ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487), which was and is as follows:

(a) Under Iowa law, exclusive sales agency contract, terminable at will of agent, could be terminated by either party at will without incurring liability for damages to the other party.

Lewis v. Minnesota Mutual Life Ins. Co., 240 Ia. 1249, 37 N. W. 2d 316.

Faulkner v. Des Moines Drug Co., 117 Ia. 120, 90 N. W. 585.

(b) Where one party to a contract is not bound to perform, and can not be held liable for failure of performance, there is lack of mutuality and it is unenforceable.

Lewis v. Minnesota Mutual Life Ins. Co., 240 Ia. 1249, 37 N. W. 2d 316.

Wickham & Burton Coal Co. v. Farmers Lumber Co., 189 Ia. 1183, 179 N. W. 417, 14 A. L. R. 1293.

II.

The law of Iowa, as above stated, with respect to contracts of the type of that in suit, conforms to the law which is generally applicable and is supported by the great weight of authority.

Lewis v. Minnesota Mutual Life Ins. Co., 240 Ia. 1249, 37 N. W. 2d 316.

E. I. Du Pont DeNemours & Co. v. Claiborne-Reno Co., 64 Fed. 2d 224, 89 A. L. R. 238 (8th Cir.), writ of Certiorari denied 290 U. S. 646, 78 L. ed. 561, 54 S. Ct. 64.

Claiborne-Reno Co. v. E. I. Du Pont DeNemours & Co., 77 Fed. 2d 565 (8th Cir.).

Santaella Co. v. Otto F. Lange Co., 155 Fed. 719 (8th Cir.).

Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co., 114 Fed. 77 (8th Cir.).

Velie Motor Car Co. v. Kopmeier Co., 194 Fed. 324 (7th Cir.).

Oakland Motor Co. v. Indiana Auto Co., 201 Fed. 499 (7th Cir.).

Woerheide v. Barber Asphalt Co., 251 Fed. 196 (8th Cir.).

Huffman v. Paige-Detroit Motor Co., 262 Fed. 116 (8th Cir.).

Miami Coca-Cola Bottling Co. v. Orange Crush Co., 296 Fed. 693 (5th Cir.).

Silbernagle v. Hirsch D. Co., 99 Fed. 2d 829 (8th Cir.).

Terre Haute Brewing Co. v. Dugan, 102 Fed. 2d 425 (8th Cir.).

Bendix Home App. Co. v. Radio Accessories Co., 129 Fed. 2d 177 (8th Cir.).

Bushwick-Decatur Motors, Inc., v. Ford Motor Co., 116 Fed. 2d 675 (2nd Cir.).

Motor Car Supply Co. v. General Household Utilities Co., 80 Fed. 2d 167 (4th Cir.).

Ford Motor Co. v. Kirkmeyer Co., 65 Fed. 2d 1001 (4th Cir.).

Tamm v. Ford Motor Co., 80 Fed. 2d 723, 729-30 (8th Cir.).

Brooks v. Sinclair Refin. Co., 139 Fed. 2d 746 (10th Cir.).

Wickham-Burton Coal Co. v. Farmers Lbr. Co., 189 Ia. 1183, 179 N. W. 417, 14 A. L. R. 1293—note 1300.

Zelen v. Domestic Industries, Inc., 135 Neb. 456, 282 N. W. 387.

Willard-Sutherland & Co. v. United States, 262 U. S. 489-493, 43 S. Ct. 592, 67 L. ed. 1086.

Myers Motors, Inc., v. Kaiser-Frazer Sales Corp., 178 Fed. 2d 291, 303 (8th Cir.).

III.

Where lower Federal Courts are applying local law, the Supreme Court will not set aside their ruling except on a plain showing of error and only in exceptional cases will the Supreme Court review applying of local law by lower Federal Courts.

D. Del Vechio v. Bowers, 296 U. S. 280, 285, 80 L. ed. 229, 232, 56 S. Ct. 190.

Palmer v. Hoffman, 318 U. S. 109, 87 L. ed. 645, 63 S. Ct. 477.

District of Columbia v. Pace, 320 U. S. 698, 702, 88 L. ed. 408, 410, 64 S. Ct. 406.

Busby v. Electric Utilities Employees Union, 323 U. S. 72, 89 L. ed. 78, 65 S. Ct. 142.

IV.

As to questions controlled by state law, conflict among Federal Circuit Courts of Appeals is not of itself a reason for granting a writ of certiorari by the Supreme Court of the United States, as the conflict may be merely corollary to a permissible difference of opinion in the state courts.

Ruhlin v. N. Y. Life Ins. Co., 304 U. S. 202, 82 L. ed. 1290, 58 S. Ct. 860.

V.

Certification can not be granted where no new or difficult questions of law are presented. In this case there are no novel or undecided questions and there is no uncertainty as to the provisions essential to the validity of a dealership or sales agency agreement.

Fabre v. Cunard S. S. Co., 59 Fed. 500, 8 C. C. A. 199.

Cella v. Brown, 144 Fed. 742, 75 C. C. A. 608, certiorari denied 26 S. Ct. 766, 202 U. S. 620, 50 L. ed. 1174.

VI.

The Circuit Court of Appeals has not in this case "decided an important question of Federal law which has not been, but should be, settled by this Court." The question decided was one of substantive law of Iowa applicable to this case and which the Circuit Court of Appeals was required to follow, and the law of Iowa with respect to contracts of the type of that in suit conforms to the law which is generally applicable.

(See cases cited under Points I and II.)

VII.

The decision of the Circiut Court of Appeals is not in conflict with the decision of Kelly-Springfield Tire Co. v. Bobo, 4 Fed. 2d 71 (9th Cir.) on the same matter.

However, if it could be so construed, it would not be a ground for certiorari for the reason that the Circuit Court of Appeals in the case at bar, as it was required to do, followed and applied the substantive common law of Iowa.

(See cases cited under Point I.)

VIII.

Writs of Certiorari to review judgments of the Courts of Appeal, are only granted under special circumstances

and such jurisdiction should be sparingly exercised, and only in cases of peculiar gravity and general importance, or to secure uniformity of decisions.

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U. S. 251, 257, 258, 60 L. ed. 629, 633, 634, 36 S. Ct. 269.

State of Ohio ex rel Seney v. Swift & Co., 260 U. S. 146, 67 L. ed. 176-179, 43 S. Ct. 22.

ARGUMENT

Points I and II.

The Petitioner's complaint shows on its face that he had and claimed the right to terminate the contract at will. It contains no allegations taking this case out from under the rule that if mutual promises are the mutual consideration of the contract, each promise must be enforceable in order to render the other enforceable. There are no facts alleged showing any separate or additional consideration. The allegations in reference to the services rendered and/or the things done by C. P. Meredith and/or the Petitioner are of the same character as those found in cases cited and referred to under Points I and II, where it was held that the contracts involved were void and unenforceable as uncertain, indefinite and lacking in mutuality of obligation.

See *Lewis v. Minnesota Mutual Life Insurance Company*, 240 Ia. 1249, 37 N. W. 2d 316; *Terre Haute Brewing Co. v. Dugan*, 102 Fed. 2d 425 (8th Cir.); *DuPont v. Claiborne-Reno Co.*, 64 Fed. 2d 224, 89 A. L. R. 238 (8th Cir.), writ of Certiorari denied 290 U. S. 646, 78 L. ed.

561, 54 S. Ct. 64; *Santaella Co. v. Otto F. Lange Co.*, 155 Fed. 719 (8th Cir.); *Miami Coca-Cola Bottling Co. v. Orange Crush Co.*, 296 Fed. 693 (5th Cir.); *Bendix Home App. Co. v. Radio Accessories Co.*, 129 Fed. 2d 177 (8th Cir.).

In Petitioner's brief, page 11, he says:

> "It is imprudent for a retailer to contract for a dealership without both the right to terminate at will and also the right to bind the wholesaler for a definite period. Prudence demands his retention of both rights."

Since the substantive law applicable to this case is that of Iowa, the District Court and the Circuit Court of Appeals were required to follow the law of that State.

> *Erie R. R. Co. v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487.

The law applicable was settled by the Supreme Court of Iowa in the case of *Lewis v. Minnesota Mutual Life Ins. Co.*, 240 Ia. 1249, 37 N. W. 2d 316, decided May 3, 1949 (same case 35 N. W. 2d 51).

The Supreme Court of Iowa in passing upon the case was called upon to consider the effect of appointing plaintiff for life as agent of the defendant company and the right of termination of such contract by either party, and particularly whether the contract was unenforceable for lack of mutuality. In doing so, the Court reviewed the various cases previously decided by the Supreme Court of Iowa and other jurisdictions, including the U. S. Circuit Court of Appeals (8th Cir.) and followed and approved the holding in the case of *Faulkner v. Des Moines Drug Co.* (Iowa), 117 Ia. 120, 90 N. W. 585, *E. I. DuPont*

DeNemours Co. v. Claiborne-Reno Co. (U. S. Cir. Ct. App. 8th Cir.) supra, *Terre Haute Brewing Co. v. Dugan* (C. C. A. 8 Cir.), and cases from other states, including Missouri, and held:

"A contract will be construed to impose an obligation in perpetuity only when language of contract compels such construction.

"A contract for life will be upheld only where intention that contract's duration is for life is clearly expressed in unequivocal terms.

"Terms of contract must be complete and sufficiently definite to enable court to determine whether it has been performed and terms are not sufficiently definite unless court can determine therefrom the measure of damages in case of a breach.

"An agreement appointing plaintiff for life as agent for life insurance company, if established, would be no more than an indefinite general hiring terminable at will of either party, in absence of a consideration additional to services to be rendered by plaintiff.

"Plaintiff's giving up of opportunity to take other employment could not be held to be additional consideration for modification of contract appointing plaintiff as agent for defendant life insurance company by oral agreement to retain plaintiff as agent for his lifetime.

"Where one party to a contract is not bound to perform it and cannot be held liable for failure of performance, there is a lack of 'mutuality' and contract is unenforceable.

"Where plaintiff was under no obligation to continue his services as agent for defendant life insurance company during his entire lifetime under contract appointing him as agent and under such

contract the amount of services which he rendered to defendant company was at his own option, agreement by defendant company to retain plaintiff as its agent during his lifetime, if established, would be unenforceable for lack of 'mutuality.'

"Under contract of appointment as agent for life insurance company, permitting agent to choose his own time and manner of work and do as little or as much as he chose in soliciting applications, agent was an 'independent contractor' and not as 'employee' of company.

"If mutual promises are the mutual consideration of a contract, each promise must be enforceable in order to render the other enforceable."

The original opinion in the case was filed December 14, 1948 (35 N. W. 2d 51), and on application a rehearing was granted, and the original opinion withdrawn. This case was carefully reviewed and the opinion quoted from at length by Carroll O. Switzer, United States District Judge, in his opinion (R. 24-27, 89 Fed. Sup. 787), and he also reviewed the other Iowa cases (R. 30-31) and correctly concluded that the substantive law applicable to the case at bar was as announced in the Lewis case.

The Petitioner in his brief cites *Standard Oil Co. v. Veland,* 207 Ia. 1340, 224 N. W. 467, as a case holding that mutuality of termination rights is not essential to the validity of any Iowa agreement. It appears that he has not correctly interpreted the holding in that case. That is one of the cases the plaintiff relied upon in the Lewis case and it was reviewed by the writer of the opinion on page 325, 37 N. W. 2d, wherein the Court said:

"Mere lack of mutuality in and of itself does not render a contract invalid. Standard Oil Co. v.

Veland, 207 Iowa 1340, 224 N. W. 467. However, this is not all the statement of the court in that case. In the opinion by Justice Evans it is stated, 207 Iowa at page 1343, 224 N. W. at page 469:

> "'*If the lack of mutuality amounts to a lack of consideration, then the contract is invalid.* But mere lack of mutuality in and of itself does not render a contract invalid. If mutual promises be the mutual consideration of a contract, *then each promise must be enforceable in order to render the other enforceable.* Though consideration is essential to the validity of a contract, it is not essential that such consideration consist of a mutual promise. A promissory note for a consideration is valid, though no mutuality appear thereon. This is true of all unilateral contracts which are supported by a consideration.'"

In the case of *Wickham & Burton Coal Co. v. Farmers' Lumber Co.*, 189 Ia. 1183, 179 N. W. 417, 14 A. L. R. 1293, it was held:

> "Since a promise, to be a consideration for another promise, must be enforceable, a contract of sale at a certain price of all the coal the buyer 'would want to purchase' from the seller was, so far as it remained executory, void for lack of mutuality; part performance by shipment of several carloads of coal under the contract being ineffectual to found a case as for breach of contract on refusal by seller to ship more."

In the Lewis case, the Court followed with approval *Du Pont v. Claiborne*, 64 Fed. 2d 224, 89 A. L. R. 238 (8th Cir.), writ of Certiorari denied 290 U. S. 646, 78 L. ed. 561, 54 S. Ct. 64, in which it was held (from syllabus 64 Fed. 2d):

> "Sales agency contract held terminable at will by agent, with promise by principal to continue con-

tract so long as principal was satisfied with agent's services.

"Though the contract did not specifically provide the agent could terminate contract at will, such fact was immaterial, and contract must be interpreted as allowing agent to do so, since it did not provide any definite time for contract to run.

"Where contract is so lacking in mutuality of obligation or certainty of consideration that it may be canceled or that specific performance will be denied on that ground, termination by either party creates no liability for damages resulting from refusal to carry it on.

"Sales agency contract giving distributor sole right to sell manufacturer's products used to refinish and polish automobiles held void for lack of mutuality of obligation and uncertainty of consideration.

"That promisee relied on promise to his injury or that promisor gains some advantage therefrom, does not establish consideration without element of bargain or agreed exchange."

From syllabus 89 A. L. R. 238:

"A distributor under a sales agency contract which was to continue so long as his services should prove satisfactory may not recover damages for its termination, whether in good faith or bad faith, where he could himself terminate the contract at any time without incurring any liabiilty therefor."

The Lewis case also followed with approval the case of *Terre Haute Brewing Co. v. Dugan,* 102 Fed. 2d 425 (8th Cir.), in which it was held:

"A contract, granting exclusive agency for sale of particular brand of beer in certain territory so long as agent wished to put his personal time and financial backing into it and remained in beer business, was void for lack of mutuality.

"Mutuality of agreement is essential to validity of contract, and written instrument, undertaking to create liability to one party without liability or obligation on other party thereto, is void as to both.

"*An ordinary oral employment contract, such as one of agency, for wholly indefinite duration or not to be performed within a year will not be considered and enforced as perpetual contract, but may be terminated at any time by either party.*

"A contract, granting exclusive agency for sale of beer in certain territory so long as agent wished to put his personal time and financial backing into it and remained in beer business, was terminable at any time by either party because of lack of mutuality, so that agent could not recover anticipated profits as damages for principal's breach of contract."

From the foregoing, it is clear that the Circuit Court of Appeals in the case at bar correctly determined and held:

"Under Iowa law, exclusive sales agency contract terminable at will of agent could be terminated by either party at will without incurring liability for damages to the other party." (R. 39-40, 185 Fed. 2d 481.)

The Court was also correct in holding that the law of Iowa, above stated, with respect to contracts of the type of that in suit, conforms to the law which is generally applicable and is supported by the great weight of authority (R. 40, 185 Fed. 2d 482).

See cases cited under Point II.

Point III.

This Court has held several times that where lower Federal Courts are applying local law, the Supreme Court

will not set aside their ruling except on a plain showing of error, and only in exceptional cases will the Supreme Court review the applying of local law by lower Federal Courts.

D. Del Vechio v. Bowers, 296 U. S. 280, 285, 80 L. Ed. 229, 232, 56 S. Ct. 190.

Palmer v. Hoffman, 318 U. S. 109, 87 L. ed. 645, 63 S. Ct. 477.

District of Columbia v. Pace, 320 U. S. 698, 702, 88 L. ed. 408, 410, 64 S. Ct. 406.

Busby v. Electric Utilities Employees Union, 323 U. S. 72, 89 L. ed. 78, 65 S. Ct. 142.

Point IV.

As to questions controlled by State law, conflict among Federal Circuit Courts of Appeal is not of itself a reason for granting a writ of certiorari.

In *Ruhlin v. N. Y. Life Ins. Co.,* 304 U. S. 202, 82 L. ed. 1290, 58 S. Ct. 860, it was held:

> "As to questions controlled by state law, conflict among Federal Circuit Courts of Appeals is not of itself a reason for granting a writ of certiorari by the Supreme Court of the United States, as the conflict may be merely corollary to a permissible difference of opinion in the state courts."

From the opinion, 304 U. S. p. 206:

> "Had Erie R. Co. v. Tompkins been announced at some prior date the course of this case might have been different. This Court might not have issued a writ of certiorari. Rule 38 (5) of the Supreme Court Rules indicates that this Court will consider, as a reason for granting a writ of certiorari, the fact that 'a circuit court of appeals has rendered a decision in

conflict with the decision of another circuit court of appeals on the same matter.' Since jurisdiction to bring up cases by certiorari from the circuit court of appeals was given to this Court in order 'to secure uniformity of decision,' Magnum Import Co. v. Coty, 262 U. S. 159, 163, 67 L. ed. 922, 924, 43 S. Ct. 531, a showing of a conflict of circuits on a matter concerning which the federal courts had never denied their right to independent judgment prompted this Court to grant the writ * * * (citing cases). As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts.''

Points V and VI.

There are no new, difficult, novel or undecided questions of law presented in this case, and there is no uncertainty in the law as to the provisions essential to the validity of a dealership or sales agency agreement. The Circuit Court of Appeals in this case did not "decide an important question of Federal Law which has not been, but should be, settled by this Court." The question decided was one of substantive law of Iowa applicable to this case and which the Circuit Court of Appeals was required to follow, and the law of Iowa with respect to contracts of the type of that in suit conforms to the law which is generally applicable.

See cases cited under Points I, II and V.

Several of the cases cited under Point II were reviewed and followed by the Court in the Du Pont case and several of those since decided have followed with approval the Du Pont case. It therefore appears that by the great

weight of authority the law which is generally applicable with respect to contracts of the type of that in suit is as found and determined by the Circuit Court of Appeals in this case.

Point VII.

The decision of the Circuit Court of Appeal in this case does not appear to be in conflict with the decision in *Kelly-Springfield Tire Co. v. Bobo,* 4 Fed. 2d 71 (9th C. C. A.). In that case, in consideration of plaintiff purchasing a stock of tires and tubes from a third person for $3,000, and in addition thereto purchasing all Kelly-Springfield tires, and tubes then in the possession of the third party, which was the property of the Kelly-Springfield Tires Company, it was agreed that Bobo should have the exclusive right to buy and sell the products of the tire company on the terms therein stated, so long as he promptly paid his account and gave proper representation. It was held that whether the contract be considered one of sale or agency, it was based upon a valuable consideration moving from the plaintiff, and was not revocable at will by the defendant. It therefore appears that there was a consideration other than the mutual promises of the parties.

This was one of the cases cited and relied upon by Claiborne-Reno Company in the Du Pont case. The 8th Circuit Court of Appeals in the Du Pont case did not consider or follow the Kelly Springfield Tire case as an authority against the contention of Du Pont. If, however, it can be construed in conflict, that would not be ground for allowing the writ of certiorari for the reason that the Circuit Court of Appeals in the case at bar, as it was re-

quired to do, followed and applied the substantive common law of Iowa.

Point VIII.

Writs of certiorari to review judgments of the Courts of Appeals are only granted under special circumstances and such jurisdiction should be sparingly exercised, and only in cases of peculiar gravity and general importance, or to secure uniformity of decisions.

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U. S. 251, 257, 258, 60 L. ed. 629, 633, 634, 36 S. Ct. 269.

State of Ohio ex rel Seney v. Swift & Co., 260 U. S. 146, 67 L. ed. 176-179, 43 S. Ct. 22.

We respectfully submit that the case at bar is not one of peculiar gravity and general importance; the Circuit Court of Appeals has not in this case decided an important question of Federal law, which has not been, but should be, settled by this Court; it has not rendered a decision in conflict with another Court of Appeals on the same matter; it has determined that the law applicable is that of the State of Iowa, which it was obliged to follow; that in short the question involved was one of common law, which is not of great public interest; that the Petitioner has presented no valid reason for the allowance of the writ of certiorari and it should be denied.

Respectfully submitted,

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CERTIORARI DENIED